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IN THE

Supreme Court of the United States

OCTOBER SESSION, 1945

No._____

DAVID E. COOL, *Petitioner,*

vs.

INTERNATIONAL SHOE COMPANY, a Corporation, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the United States:

David E. Cool respectfully prays for the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review an opinion and judgment of the Circuit Court of Appeals for the Eighth Circuit rendered April 12, 1946, in this cause, wherein International Shoe Company was Appellant and this peti-

tioner was Appellee. The judgment reversed an order by the District Court of the United States for the Eastern District of Missouri, entered in accordance with the provisions of Rule 41 of the Rules of Civil Procedure, permitting plaintiff (your petitioner) to dismiss without prejudice (a voluntary nonsuit) (R 327).

BASIS OF JURISDICTION.

The opinion and judgment of the Circuit Court of Appeals were filed on April 12, 1946. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended (28 U.S.C. 347 and 350).

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in this case appears on pages 337 to 342 of the transcript of the Record filed herewith.

SUMMARY STATEMENT OF MATTERS INVOLVED.

Plaintiff had been a shoe worker since he was eleven years of age. Defendant, a Delaware corporation, owns and operates 48 shoe factories in Missouri, Illinois, Kentucky and New Hampshire and has its general offices at 1509 Washington Avenue in St. Louis.

Plaintiff was employed in the defendant's Mullanphy Street factory in St. Louis when it began the manufacture of a shoe described as a double-welt shoe, which was made in accordance with a patented process and which was supposed to have particular merit. The defendant encountered great difficulty in the manufacture of the new shoe. In channeling the insoles, a scoring device was used to cut away a chip from one side of the edge. Sometimes it failed to cut the chip off and then it had to be done by hand. Often it cut too deep and so weakened the insole that it had to be discarded. At all times it left a square shoulder and when the inseam was placed under it, the leveler forced the stitches through the insole or broke them and the shoe had to be sold as a "damaged" shoe. As a result the company was suffering very great losses. Mr. Moulton, its general superintendent and later its president, said:

> "There is something got to be done. No factory and no company can exist with this tremendous damage per case."

The company had posted a bulletin in the factory promising to compensate employees for the use of anything they might suggest that would benefit the company. With this promise in mind, plaintiff began experimenting in a shop in the basement of his home with a view to overcoming the difficulty they were having in manufacturing the double-welt shoes. He devised a knife having a separable cut-off blade with an inclined cutting edge which could be

adjusted to the horizontal splitting blade and which would cut the chip off the sole at an acute angle, thus leaving an overhanging shoulder under which the inseam could be placed at the extreme inner edge of the slit without hindrance and without danger of its being cut or forced through the sole by the leveler.

At his own expense plaintiff had a knife made according to his specifications and he devised a knife block holder to attach his knife to a Goodyear Channeler, also presser feet and presser gauges for use on that machine.

Mr. Moulton conferred with the employees and R. S. Cunningham, the Superintendent of that factory, about the matter. They discussed the knife devised by plaintiff and **Mr. Moulton said to "put it on," that it "looks okay to me" and "if it works, we will take care of you. The company is no piker."**

On another occasion, when Mr. Moulton examined a case of 36 pairs of double-welt shoes in which 25 pairs were damaged, he stated that no factory could suffer such damage and continue to exist. He was then shown a case of shoes made with plaintiff's devices and he said:

> "That is wonderful. If that works, this company will pay you well, Mr. Cool. You have got nothing to worry about."

Plaintiff offered to prove similar statements and promises made by R. S. Cunningham, the Superintendent of the factory, but, because a physician employed by the defendant testified that without ever having seen Cunningham before or since and without knowing how long he had been ill, he had concluded, as a result of a single visit to Cunningham's home, which lasted thirty minutes, that Cunningham's memory was defective and that "he did not

realize the significance of why I was there," the Court excluded the testimony.

The Cool devices were entirely successful in overcoming the difficulty defendant had encountered in manufacturing the double-welt shoes. Just as soon as he had perfected them they were adopted by the defendant and used by it continuously for fourteen years in its Mullanphy Street factory and later in a new factory it built to manufacture the double-welt shoe at Paducah, Kentucky.

In a stipulation which appears between pages 22 and 25 of the Record defendant admits that from the year 1918 until 1932, when the manufacture of the double-welt shoes was discontinued, the company used continuously the channeling knives having separable cut-off blades as exemplified by exhibits which were shown by the evidence to have embodied the Cool device and that during this period it manufactured 7,950,000 pairs of the double-welt shoes. In the year 1924 alone, it made 1,378,895 pairs of double-welt shoes or at the rate of 4,500 pairs per day.

The Cool attachments reduced the time required to channel a case of insoles from 60 minutes to 4 minutes. It saved an enormous number of insoles that would otherwise have been damaged so that they could not be used and it prevented damage to a vast number of manufactured shoes. The evidence in the Record showed that the saving effected by the defendant through the use of the Cool devices during this period amounted to $6,944,066.68.

From time to time after the company began the use of the plaintiff's devices, he requested payment on account of moneys due him but was put off with promises that the matter was under consideration by the Board of Directors, that he would be taken care of, that he had nothing to worry about, etc.

In 1933, plaintiff learned that defendant had quit making the double welt shoe and therefore had discontinued the

use of his devices. He then consulted an attorney who investigated the matter and made demand upon the defendant for payment of the compensation owing to the plaintiff for the use of his devices in accordance with defendant's oral promises. Such demand being refused, plaintiff, on October 1, 1936, filed suit against the defendant.

Plaintiff's suit was met with three separate motions to make the petition more definite and certain and finally by a motion to dismiss. Every one of these four motions was sustained. Following each of the three rulings of the District Judge that the complaint must be made more definite and certain, plaintiff amended his complaint but when upon sustaining the fourth of said motions the District Judge added to his ruling "without leave to amend," thus preventing the plaintiff from pleading over, plaintiff was compelled to and did appeal to the United States Circuit Court of Appeals for the Eighth Circuit. That court, in a unanimous decision by Judge Riddick, 142 Fed. (2d) 318, overruled the District Judge and held that the amended complaint did state a cause of action notwithstanding that it was long and prolix, that it set forth statements of evidence and that its allegations were repeated time and time again but Judge Riddick pointed out that this condition had been made worse by the defendant's repeated motions for particular statements. Then when the mandate went down from the Court of Appeals the defendant filed its answer on July 1, 1944—exactly seven years and nine months after the filing of the original complaint.

When the case was called for trial on June 11, 1945, plaintiff moved for a continuance, which motion was by the Court overruled (R. 322).

During the trial, many rulings adverse to the plaintiff were made by the Court and which we believe to have been erroneous.

At the close of the plaintiff's case when it was announced that "plaintiff rests" the defendant filed a motion in writing (R. 322) entitled "Motion for directed verdict at close of plaintiff's case" which set forth 26 alleged "grounds" for the motion.

Thereupon the Court inquired of plaintiff concerning his motion for the appointment of an auditor, etc., and upon being advised that the motion had been read into the Record, the Court announced a recess and the Court and counsel adjourned to the chambers of the Court where discussion was had among the Court and counsel (R. 322).

When that discussion in chambers was concluded and the trial was resumed in open Court, the following proceedings were had, as indicated by the Record (R. 322):

> "By the Court: Let the record show that at the close of plaintiff's case, the Court indicates his intention of directing a verdict in favor of defendant.
>
> "By Mr. Hart: Whereupon the plaintiff asks leave to take a nonsuit.
>
> "By the Court: Which leave is granted."

Thereupon the Court entered an order reading as follows:

> "Motion of defendant for a directed verdict in its favor at the close of plaintiff's case in chief is filed, argued and submitted, and the Court indicating its intention to sustain said motion, plaintiff asks and is granted a voluntary nonsuit; the jury is thereupon discharged and the Court doth order that this cause be and it is hereby dismissed at plaintiff's costs."

Two days later (June 20, 1945) the defendant filed (R. 327) a "motion to set aside order permitting plaintiff voluntary nonsuit or dismissal without prejudice" and

stating at the end thereof "that the dismissal should be allowed only with prejudice or upon condition that plaintiff indemnify defendant for expenses incurred in preparation for and in the trial of this cause." That motion was overruled by the trial Court.

Thereupon the defendant appealed to the United States Circuit Court of Appeals for the Eighth Circuit, which Court **reversed the decision of the trial court in granting plaintiff leave to take a nonsuit and it directed that the case be dismissed with prejudice.** It is to review that decision of the United States Circuit Court of Appeals for the Eighth Circuit that this petition for a writ of certiorari is filed.

REASONS FOR GRANTING THE WRIT.

Summary.

THE QUESTIONS GENERALLY.

The decision below presents a question of far-reaching importance involving the construction of Rule 41 of the Rules of Civil Procedure which has not been, but should be determined by this Court.

A.

1. The decision below, in effect, nullifies the provision in Rule 41(b) which makes it discretionary with the trial Court whether plaintiff shall be allowed to dismiss with prejudice or without prejudice. It disregards and denies legal effect to the unambiguous language of one of the Rules of Civil Procedure promulgated by this Court.

2. Rule 41 is declaratory of a long established practice and it should be construed with reference to the precedents. The decision of the Circuit Court of Appeals conflicts in principle with controlling decisions of this Court.

Ex Parte Skinner & Eddy Corp., 265 U. S. 86, 93, 68 L.Ed. 912, 914.

Pullman Palace Car Co. v. Central Transportation Co., 171 U. S. 138, 145, 146, 43 L.Ed. 108, 111, 112.

General Inv. Co. v. Lake Shore & M. S. Ry. Co., 260 U. S. 261, 281, 67 L.Ed. 244, 257.

Jones v. Securities & Exchange Comm., 298 U. S. 1, 19, 20, 80 L.Ed. 1015, 1022-3.

Ford Motor Co. v. National Labor Relations Board, 305 U. S. 364, 83 L.Ed. 221.

It is in conflict with decisions of other Circuit Courts of Appeal and with its own decisions in other cases.

Worthington v. McGough (6th C.C.A.), 192 Fed. 513, 514.

Kleid v. Ruthbell Coal Co. (2d C.C.A.), 131 Fed. (2d) 372, affirming In Re Empire Coal Sales Co. (C.C.), 45 F. Supp. 974.

Harding v. Corn Products Ref. Co. (7th C.C.A.), 108 Fed. 658, 664-5.

Hines v. Martin (5th C.C.A.), 266 Fed. 653, 656.

United States v. Norfolk & Western Ry. Co., 118 Fed. 554, 555-6.

United Motors Service v. Tropic-Aire (8th C.C.A.), 57 Fed. (2d) 479, 488.

American Grain Separator Co. v. Twin City Separator Co. (8th C.C.A.), 202 Fed. 202, 206.

It is contrary to the clearly expressed interpretation of said Rule 41 by the Supreme Court's Advisory Committee on Rules.

Honorable William D. Mitchell at the American Bar Association's Institute on Federal Rules, pages 382 and 383.

B.

The authority of the Circuit Court of Appeals was limited to consideration of the question as to whether the trial court had abused its discretion in allowing plaintiff to dismiss without prejudice. Instead, it considered the case on its merits.

Its decision conflicts in principle with the decisions of this Court:

Ex Parte Skinner & Eddy Corp., 265 U. S. 86, 93, 68 L.Ed. 912, 914.

Barrett v. Virginian Ry. Co., 250 U. S. 473, 478.

Jones v. Securities & Exchange Comm., 298 U. S. 1, 80 L.Ed. 1015.

And is in conflict with the decisions of other Circuit Courts of Appeal:

Kleid v. Ruthbell Coal Co. (2d C.C.A.), 131 Fed. (2d) 372, 373.

Harding v. Corn Products Ref. Co. (7th C.C.A.), 108 Fed. 658, 664-5.

Hines v. Martin (5th C.C.A.), 286 Fed. 653, 656.

Prudential Ins. Co. v. Stack (4th C.C.A.), 60 Fed. 830, 831.

United States v. Norfolk & Western Ry. Co. (4th C.C.A.), 118 Fed. 554, 555-6.

Worthington v. McGough (6th C.C.A.), 192 Fed. 513, 514.

And it is also in conflict with other decisions of the Circuit Court of Appeals for the Eighth Circuit:

Hartford-Empire Co. v. Obear-Nester Glass Co. (8th C.C.A.), 95 Fed. (2d) 414, 417, 423-4.

United Motors Service v. Tropic-Aire (8th C.C.A.), 57 Fed. (2d) 479, 488.

American Grain Separator Co. v. Twin City Separator Co. (8th C.C.A.), 202 Fed. 202, 206.

C.

The decision of the Circuit Court of Appeals that failure of the Record to disclose specific grounds as the basis of plaintiff's application for permission to dismiss with-

out prejudice, such as the existence of further evidence that might be produced, warranted a reversal of the action of the trial court in granting plaintiff leave to dismiss is in conflict with the decisions of this Court in Ex Parte Skinner & Eddy Corp., 250 U. S. 86, 93.

And is in conflict with the decision of the Sixth Circuit Court of Appeals in Worthington v. McGough, 192 Fed. 513, 514.

D.

The decision of the Circuit Court of Appeals that because (1) the action had been pending a long time (defendant's answer had been on file less than one year (R. 16), and (2) his compplaint had been amended three times (the Circuit Court of Appeals had already held that these amendments were forced upon plaintiff without reason—142 Fed. [2d] 318), and (3) he had ample opportunity to prepare for trial, and (4) four and a half days had been consumed in taking testimony, and (5) the trial court had announced its intention to sustain the motion for a directed verdict, "amounting to a decision on the merits," and (6) the discontinuance deprived the defendant of a decision in its favor (R. 341), that, therefore, the decision of the trial court in granting plaintiff leave to dismiss should be reversed, is in conflict with the decision of this Court in Pullman Palace Car Co. v. Central Transportation Co., 171 U. S. 138, 145, 146, 43 L.Ed. 108, 111, 112.

It violates the plain and unmistakable language of Rule 41 of the Rules of Civil Procedure.

It is in conflict with the decisions of other Circuit Courts of Appeal:

Harding v. Corn Products Ref. Co. (7th C.C.A.), 108 Fed. 658, 664-5.

Hines v. Martin (5th C.C.A.), 286 Fed. 653, 656.

Worthington v. McGough, 192 Fed. 513.

It is also in conflict with other decisions of the Circuit Court of Appeals for the Eighth Circuit in

United Motors Service v. Tropic-Aire, 57 Fed. (2d) 479, 486, 488.

American Grain Separator Co. v. Twin City Separator Co., 202 Fed. 202, 206.

E.

The decision of the Circuit Court of Appeals that the order of the trial court permitting the case to be "dismissed at plaintiff's cost" was not a compliance with the provisions of Rule 41 (a) (2), which gives the trial court power to grant a dismissal without prejudice upon "such terms and conditions as the Court deems proper," in that the Court's order did not expressly make the payment of the costs a condition of the leave to dismiss, was without warrant inasmuch as the defendant did not question the trial court's order in this respect, it is in conflict with the Rules of Civil Procedure and particularly the plain, unambiguous language of said Rule 41 (a) (2) and it ignores the provision in subdivision (d) of said Rule 41 which affords complete protection against the prosecution of another action based upon the same claim without payment of the costs.

ESTABLISHED GOVERNING PRINCIPLES.

The following propositions must be regarded as settled by the decisions of this Court and the Circuit Courts of Appeal.

I.

"The general rule is settled for the federal tribunals that a plaintiff possesses the unqualified right to dismiss his complaint at law or his bill in equity unless some plain legal prejudice will result to the defendant other than the mere prospect of second litigation upon the same subject matter."

Jones v. Securities & Exchange Comm., 298 U. S. 1, 19, 80 L.Ed. 1015, 1022-3.

See also:

Pullman Palace Car v. Central Transportation Co., 171 U. S. 138, 145, 146, 43 L.Ed. 108, 111, 112.

General Inv. Co. v. Lake Shore & M. S. Ry. Co., 260 U. S. 261, 281, 67 L.Ed. 244, 257.

Ford Motor Co. v. National Labor Relations Board, 305 U. S. 364, 370, 83 L.Ed. 221, 228.

Ex Parte Skinner & Eddy Corp., 265 U. S. 86, 93, 68 L.Ed. 912, 914.

Orr v. Coca Cola Co. (9th C.C.A.), 247 Fed. 452, 453.

Harding v. Corn Products Ref. Co. (7th C.C.A.), 168 Fed. 658, 664-5.

II.

"Permission to withdraw must rest in the sound discretion of the Court, to be exercised in the light of the circumstances of the particular case."

Ford Motor Co. v. National Labor Relations Board, 305 U. S. 364, 370, 83 L.Ed. 221, 228.

See also:

Rule 41 of the Rules of Civil Procedure.

General Investment Co. v. Lake Shore & M. S. Ry., 260 U. S. 261, 281, 67 L.Ed. 244, 257.

Worthington v. McGough (6th C.C.A.), 192 Fed. 513, 514.

United Motors Service v. Tropic-Aire (8th C.C.A.), 57 Fed. (2d) 479, 488.

After the defendant has made a motion for a directed verdict and the Court has indicated that the motion will be sustained

> "the Court may under our rules in that case allow the plaintiff to dismiss without prejudice. It is discretionary with the Court whether it shall be with prejudice or without prejudice. * * * The mere fact that the Judge has given an inkling that he is going to grant the motion for a directed verdict does not amount to a direction of the verdict, and until he has directed a verdict and that action has been taken, I think it is open to the trial Court to allow a dismissal without prejudice."
>
> Honorable William D. Mitchell, chairman of the Supreme Court's Advisory Committee on Rules, at the American Bar Association's Institute on Federal Rules, pages 382 and 383.

> "There is danger of an appellate court substituting its judgment as to what should have been done in a situation such as here presented instead of realizing that **the exercise of the discretion is for the trial Court. * * * Where that Court has not departed from the rules and principles of equity established for its guidance, its orders in this regard may not be reversed by the appellate court without clear proof that it abused its discretion.** The question is not whether the appellate court would have made or would make the order. It is to the discretion of the trial Court,

not to that of the appellate court, that the law has intrusted the power to grant or dissolve such an injunction, and the question here is: Does the proof clearly establish an abuse of that discretion by the Court below? Of course, judges of courts of original jurisdiction are just as anxious that no legal injustice be done as is the appellate court. They are on the ground and have more intimate knowledge of the situation than an appellate court has. Ordinarily, they would not permit dismissal of a case if thereby an injustice were done to a defendant. They are the ones to determine that question in the exercise of a sound discretion. This discretion is a legal discretion, not merely an arbitrary one.

"If the Court had refused to permit a dismissal without prejudice and had dismissed the case on its merits we could not have said it abused its discretion. The question for this Court is not whether discretion was wisely exercised, but whether it was abusively exercised. We should be clear in our conviction that the trial Court abused its discretion in order to reverse its action. We do not have that abiding conviction."

United Motors Service v. Tropic-Aire (8th C.C.A.), 57 Fed. (2d) 479, 488.

"The statute was not intended to prevent a trial judge from permitting such a discontinuance, when, in his discretion, he thinks the plaintiff should have another opportunity to present the case. It seems obvious that if, at the close of plaintiff's case, it lacks some essential element, so that a verdict against him must be directed, and this conclusion has been announced by the judge, it may often be entirely proper that the Court should open up the case, and permit further proof to cure the defect, and that in a proper case the Court can, and should, by withdrawing a juror, bring about a continuance and another trial. * * * We are satisfied that in a case like this the only question existing for review is whether there was an abuse of discretion.

"Coming now to the question, the record advises us that the only purpose of the trial judge was to permit the plaintiff to try the same issue in another Court; but it gives us no information as to why he thought proper to take this course. It does not show for what reason the plaintiff's case was thought to have failed. Under such a record, we cannot say that the trial judge abused his discretion, unless we can say that there could be no reason supporting its exercise in the manner in which it was exercised: and this, we are clear, we cannot do."

Worthington v. McGough (6th C.C.A.), 192 Fed. 513, 514.

III.

"Unless there is an obvious violation of a fundamental rule of a court of equity or an abuse of the discretion of the Court, the decision of a motion for leave to discontinue will not be reviewed here."

Pullman Palace Car Co. v. Central Transportation Co., 171 U. S. 138, 145, 146, 43 L. Ed. 108, 111, 112.

See also:

Mexican Central R. Co. v. Pinkney, 149 U. S. 194, 201, 37 L. Ed. 699, 702.

Chapman v. Barney, 129 U. S. 677, 680, 32 L. Ed. 800, 801.

Gormley v. Bunyan, 138 U. S. 623, 630, 34 L. Ed. 1086, 1089.

Cheang-Kee v. U. S., 3 Wall. 320, 326, 18 L. Ed. 72, 74.

The discretionary power given the trial Court by Rule 41 to allow a dismissal without prejudice

"upon such terms and conditions as the Court deems proper"

corresponds to that granted it by the old Equity Rule 34 to permit the filing of a supplemental bill

"upon such terms as are just,"

and the interpretation of that rule is well settled.

"An application for leave to file a supplemental bill is addressed to the discretion of the Court, and the ruling thereon will not be disturbed on appeal unless the discretion is abused."

General Inv. Co. v. Lake Shore & M. S. Ry. Co., 260 U. S. 261, 281, 67 L. Ed. 244, 257.

"The granting or refusing leave to file an amended bill or plea is a matter within the discretion of the trial Court and will not be reviewed in an appellate court unless there has been gross abuse of this discretion."

Berliner Gramophone Co. v. Seaman (4th C.C.A.), 113 Fed. 750.

"It is a well established rule that leave to file a supplemental bill rests in the sound discretion of the Court, and the action of the judge in either refusing or permitting the filing of such a bill will not be disturbed upon appeal except upon a showing of gross abuse of discretion."

Selden v. General Chemical Co. (3rd C.C.A.), 73 Fed. (2d) 195, 196.

"Except in a case where there is an obvious violation of a fundamental rule or an abuse of the discretion of the Court, the action of the Circuit Court in granting or refusing leave to dismiss will not be reversed."

Orr v. Coca-Cola Co. (9th C.C.A.), 247 Fed. 452, 453, quoting from Street's Federal Equity Practice 804.

See also:

Chapman v. Barney, 129 U. S. 677, 680, 32 L. Ed. 800, 801.

Gormley v. Bunyan, 138 U. S. 623, 630, 34 L. Ed. 1026, 1089.

Mexican Central Ry. v. Pinkney, 149 U. S. 194, 201, 37 L. Ed. 699, 702.

Rosemary Mfg. Co. v. Halifax (4th C.C.A.), 266 Fed. 363, 364.

General Electric Co. v. Alexander (2d C. C. A.), 280 Fed. 852, 855-6.

Continental Oil Co. v. Osage O. & R. Co. (8th C.C.A.), 57 Fed. (2d) 527.

IV.

It is not necessary that the record "disclose any specific grounds as the basis of plaintiff's application for permission to dismiss without prejudice," as stated by the Circuit Court of Appeals in this case (R. 341).

> "The right to dismiss, if it exists, is absolute. It does not depend on the reasons which the plaintiff offers for his action. The fact that he may not have disclosed all his reasons, or may not have given the real one, cannot affect his right."
>
> Ex Parte Skinner & Eddy Corp., 265 U. S. 86, 93, 68 L. Ed. 912, 914.

> "The record advises us that the only purpose of the trial judge was to permit the plaintiff to try the same issue in another court; but it gives us no information as to why he thought proper to take this course. It does not show for what reason the plaintiff's case was thought to have failed. Under such a record, we cannot say that the trial judge abused his discretion, unless we can say that there could be no reason supporting its exercise in the manner in which it was exercised: and this, we are clear, we cannot do."
>
> Worthington v. McGough (6th C.C.A.), 192 Fed. 513, 514.

V.

The fact that the trial Court had announced its intention to sustain defendant's motion for a directed verdict, and that the discontinuance of plaintiff's action would deprive defendant of a decision on the merits was not a reason for refusing permission to dismiss and failure to refuse such permission does not constitute ground for reversal of the trial Court's decision, as indicated by the Circuit Court of Appeals in this case (R. 341).

> "The mere fact that the judge has given an inkling that he is going to grant the motion for a directed verdict does not amount to a direction of the verdict, and until he has directed a verdict and that action has been taken, I think it is open to the trial judge to allow a dismissal without prejudice."
>
> Honorable William D. Mitchell, chairman of the Supreme Court's Advisory Committee on Rules, at the American Bar Association's Institute on Federal Rules, pages 382 and 383.

> "There must be some plain, legal prejudice to defendant to authorize a denial of the motion to discontinue; such prejudice must be other than the mere prospect of future litigation rendered possible by the discontinuance."
>
> Pullman Palace Car Co. v. Central Transportation Co., 171 U. S. 138, 145, 146, 43 L.Ed. 108, 111, 112.
>
> See also
>
> Jones v. Securities & Exchange Comm., 298 U. S. 1, 19, 20, 80 L.Ed. 1015, 1022-3.

> "To authorize denial of such right to discontinue there must be some plain legal prejudice to the other parties, which must be other than the mere prospect of future litigation as its result."
>
> Harding v. Corn Products Ref. Co. (7th C.C.A.), 168 Fed. 658, 664-5.

"The defendants did not show that they would have been deprived of any right against the plaintiff by the dismissal of the case, but only that they might be subjected to the annoyance of another suit. This alone is insufficient to entitle defendants to object to the discontinuance of a suit in equity by voluntary dismissal by the plaintiff without prejudice."

Hines v. Martin (5th C.C.A.), 286 Fed. 653, 656.

"The mere possibility that the defendant may be harrassed by another litigation directed to the same object is not enough to disentitle the plaintiff to dismiss. The prejudice that the law contemplates as sufficient to authorize a denial of the plaintiff's motion to dismiss must be some plain, legal prejudice other than a mere prospect of future litigation rendered possible by the dismissal of the Bill."

Orr v. Coca-Cola Co. (9th C.C.A.), 247 Fed. 452, 453, quoting from Street's Federal Equity Practice 804.

VI.

Many of the cases relating to the right of plaintiff to dismiss at his own costs state that the order of dismissal should be on condition that the plaintiff pay the costs and in its opinion in this case the Circuit Court of Appeals makes the observation

"It is observed that the dismissal was not conditioned upon the payment of costs but merely carried a judgment for costs" (R. 341).

and it cites its own decision in Home Owners' Loan Corp. v. Huffman, 134 Fed. (2d) 314, 316, in which it was stated that

"A judgment is not equivalent to payment."

However, the Court of Appeals in this case failed to observe further that although the trial court in the Home Owners' Loan case did not make payment of the costs a

condition of the dismissal, yet the Court of Appeals did not reverse the decision of the lower court but merely directed that the order of dismissal be modified to include the condition that the costs be paid.

But whatever the practice may have been prior to the adoption of the Rules of Civil Procedure, the fact is that Rule 41 does not stipulate that a dismissal without prejudice shall be conditioned upon the payment of costs. It merely provides that the dismissal shall be

> "upon such terms and conditions as the court shall deem proper."

Furthermore, and of the utmost importance here, is the fact that this defendant has never objected to the order of dismissal on the ground that it was not conditioned upon the payment of costs as distinguished from the taxation of costs. Two days after the order of dismissal was entered the defendant filed a motion to set aside the order "permitting plaintiff a voluntary nonsuit, or a dismissal without prejudice," which asserted fourteen separate reasons why the motion should be granted (R. 327). In connection with its appeal defendant also filed a "Statement of Points on Appeal" (R. 330). In neither of these documents, the "Motion to set aside" nor the "Statement of Points on Appeal," did defendant object to the order of dismissal on the ground that it was not conditioned upon the payment of costs as distinguished from the taxation of costs.

All of which gives emphasis to the correctness and logic of the decision of the Circuit Court of Appeals for the Sixth Circuit in Worthington v. McGough, 192 Fed. 513, 514, in which it was so well said:

> "The Record * * * gives us no information as to why he thought proper to take this course. It does not show

> **for what reason the plaintiff's case was thought to have failed. Under such a record, we cannot say that the trial judge abused his discretion, unless we can say that there could be no reason supporting its exercise in the manner in which it was exercised: and this, we are clear, we cannot do."**

And also the decision of Judge Kenyon in United Motors Service v. Tropic-Aire (8th C.C.A.), 57 Fed. 479, 488.

> "Of course, judges of courts of original jurisdiction are just as anxious that no legal injustice be done as is the appellate court. **They are on the ground and have more intimate knowledge of the situation than an appellate court has.** Ordinarily they would not permit dismissal of a case if thereby an injustice were done to defendant."

And so here, the trial court was on the ground and had an intimate knowledge of the situation. He knew facts in the case which do not appear of record on this appeal—among them the fact that plaintiff had deposited an ample surety company bond which fully guaranteed and made certain the payment of the costs, also that when the request for leave to dismiss was granted the Court expressly stated, in answer to a question by defendant's counsel, that the dismissal was on condition that plaintiff pay the costs. Therefore, if in its motion to set aside the order the defendant had made any point of the fact that the order as entered failed to stipulate the condition that plaintiff should pay the costs, the order could have been corrected at once.

The provision in Rule 41(d) that the Court may require the plaintiff in a suit to pay the costs of any previous action based upon the same claim certainly contemplates the possibility that such a suit may have been dismissed without the costs being paid and it affords a defendant complete protection against the possibility that a second suit may be prosecuted without the costs in the first suit being paid.

ARGUMENT.

When the case was called for trial, within a year after the defendant's answer had been filed, the Court denied plaintiff's motion for a continuance. During the 4½ days that the case was on trial before him the Court made many rulings adverse to the plaintiff, which involved questions of discretion and judgment and many of which the Court might have ruled either way.

When it was announced that "plaintiff rests" the defendant filed a written motion for a directed verdict, which set forth 26 alleged grounds.

Thereupon the Court announced a recess and the Record shows that

> "At this point the Court and counsel adjourned to the chambers of the Court, where a discussion was had among the Court and counsel" (R. 322).

And upon the return of Court and counsel to the court room the following took place:

> "By the Court: Let the record show that at the close of plaintiff's case, the Court indicates his intention of directing a verdict in favor of defendant.
>
> "By Mr. Hart: Whereupon the plaintiff asks leave to take a nonsuit.
>
> "By the Court: Which leave is granted."

The Record is completely silent as to what took place in the chambers of the Court during the discussion which followed the filing of defendant's motion for directed verdict and which resulted in the entry in the Record, following the return of Court and counsel to the court room, whereby the Court indicated its intention to sustain the motion for a directed verdict, and whereupon plaintiff asked leave to take a nonsuit, which was granted.

However, it is conclusively inferrable from what the Record does show that the Court was of the opinion that the plaintiff's case lacked some essential element so that a verdict should be directed against him, also that the Court was of the opinion that the plaintiff should have another opportunity to present his case and that for this purpose a request for leave to take a nonsuit should be granted.

Beyond question the Court might have granted the motion for a continuance and also it might very well have ruled that this doctor's testimony did not warrant the exclusion of the evidence concerning statements and promises that were made by Cunningham as superintendent of defendant's factory. There were many other rulings which likewise involved question of discretion and judgment. To say that the plaintiff might have allowed the case to go to the jury and then appeal from an adverse result, and in that way have the propriety of the ruling in excluding the testimony concerning Cunningham's promises determined is not an answer to the suggestion that the trial court itself had a right to correct such error or, after a false impression may have been conveyed to the jury on account of his previous ruling, to afford plaintiff another opportunity to again present his case.

This was expressly ruled by the Circuit Court of Appeals for the Sixth Circuit in Worthington v. McGough, 192 Fed. 513, 514.

Furthermore, as was so well stated by Judge Kenyon in United Motors Service v. Tropic-Aire, 57 Fed. (2d) 479, 488, the trial judge was on the ground and has a more intimate knowledge of the situation than an appellate court has.

Or, as the Supreme Court of Missouri expressed the same thought in McCarty v. Transit Co., 192 Mo. 396, 401-2:

> "The trial judge stands peculiarly close to the fountain-head of legal justice. He is the high priest presiding at the very altar of the temple. To him it is given to hear the intonation of the voice of a witness, to see his manner, his cast of countenance, the glance of his eye, the behavior of the jury, their intelligence, their attention and the whole network of small incidents creating an atmosphere about a case and tending possibly to a perverted result or otherwise, none of which can be preserved in the bill of exceptions and sent here, and in him, therefore, should exist the courage to prevent a miscarriage of right. . . .
>
> "In the earlier case of Schmidt v. Railroad, 149 Mo. 282, our present Chief Justice thus tersely spoke: 'The trial judge holds in his hands more than any other tribune the power to shape the trials of cases to accomplish the ends of justice. One of the chief means at his disposal is the power to grant new trials and he ought to exercise it whenever in his judgment unfair advantage has been obtained at the expense of justice.'
>
> "So we say in this case: The trial judge was at the very seat of justice. The verdict in this case disturbed his idea of justice. He set it aside and it should so remain: It matters not that he may have assigned a wrong reason for his action if there be a good reason covered by the motion for a new trial."

In determining whether plaintiff should be allowed to dismiss without prejudice, the trial court exercised a discretion which rule 41 clearly and in terms reposed in him. It was a matter of discretion, to be exercised in the light of the circumstances of the particular case and the decisions are unanimous in holding that unless there was an obvious violation of a fundamental rule or an

abuse of the discretion of the Court, the action of the trial court in granting or refusing leave to dismiss will not be reversed.

As pointed out earlier, the practice prior to the adoption of the Rules of Civil Procedure gave the plaintiff the "right to dismiss his complaint at law or his bill in equity unless some plain legal prejudice would result to the defendant other than the mere prospect of litigation upon the same subject matter." Jones v. Securities & Exchange Commission, 298 U. S. 1, 19. Rule 41 was not intended to abolish that right.

Probably the man who was closer to this Court in the drafting of the Rules of Civil Procedure than any other and who, therefore, is, next to the judges of this Court, best qualified to interpret it is Honorable William D. Mitchell, the chairman of the Supreme Court's Advisory Committee on Rules, which advised with and consulted the Supreme Court in the preparation of the rules. These rules had been adopted by the Supreme Court but they could not become effective until ninety days after the end of the session of Congress that would adjourn on June 16, 1938, so that they would not become effective until September 16, 1938.

On July 21-23, 1938, almost two months before the date the rules would become effective, the American Bar Association conducted a three days' "Institute on Federal Rules" at Western Reserve University, Cleveland, which was attended by all of the members of the Supreme Court's Advisory Committee and 488 lawyers. The six members of the Supreme Court Advisory Committee delivered addresses and answered questions concerning the Rules, their language and their meaning. The printed record of the proceedings of that Institute is unique and it is without parallel in the history of jurisprudence in America.

During the Question and Answer period of the Institute on Federal Rules many interesting questions were propounded and many enlightening answers were made by the members of the Advisory Committee of the Supreme Court.

On page 382 of the report of those proceedings, this question was put to Mr. Mitchell:

> "The Fourth Circuit Court of Appeals, contrary, I believe, to other Circuit Courts, has held that after the defendant has made a motion for a directed verdict at the conclusion of all the evidence, and the Court has indicated such motion will be sustained (has indicated it will be—hasn't yet done it!), that it is no longer within the discretion of the court to permit the plaintiff to take a voluntary dismissal. Does Rule 41 (a) (2) give the Court power to grant the plaintiff a voluntary dismissal under such circumstances in the Fourth Circuit?"

In reply, Mr. Mitchell said:

> "My first answer is that if it does so in one circuit it does in all and the second answer is that Rule 41 (a) (2) relating to dismissal expressly provides that the case mentioned comes under Rule 41 (a) (2), voluntary dismissal by order of the Court. Now, as I read the rule and understand the question, **the Court may under our rules in that case allow the plaintiff to dismiss without prejudice. It is discretionary with the Court whether it shall be with prejudice or without prejudice.** Rule 41 (a) (2) says: 'Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.' So if the Court allowed the dismissal and said nothing, it would be without prejudice.
>
> "Now, my understanding of the rest of the question is that it relates to a question of general law and not particularly a matter of rule, and I should say that **the mere fact that the Judge has given an inkling that**

> **he is going to grant the motion for a directed verdict does not amount to a direction of the verdict, and until he has directed a verdict and that action has been taken, I think it is open to the trial judge to allow a dismissal without prejudice."**

On page 383 of the report of the proceedings of the Institute on Federal Rules, Mr. Mitchell was asked to distinguish

> "between the office of the motion to dismiss at the conclusion of the plaintiff's evidence [Rule 41 (b)], and the motion for instructed verdict by defendant at the conclusion of plaintiff's evidence [Rule 50 (a)]."

In reply to that request, Mr. Mitchell said:

> "The only distinction is this: that if you make a motion for dismissal under Rule 41 (b) **it is discretionary with the trial court** whether he will dismiss with or without prejudice. If you make a motion for an instructed verdict at that stage of the case under Rule 50 (a), the judge has to deny it or grant it—and if he grants it there certainly is prejudice."

Therefore, with all of the other members of the Advisory Committee and 488 members of the American Bar Association present, Mr. Mitchell, who had given the matter the most searching study, stated that

> It is discretionary with the Court whether plaintiff shall be allowed to dismiss with prejudice or without prejudice,

and that

> The mere fact that the Judge has given an inkling that he is going to grant the motion for a directed verdict does not amount to a direction of the verdict,

> and until he has directed a verdict and that action has been taken, I think it is open to the trial judge to allow a dismissal without prejudice.

That interpretation by Mr. Mitchell, speaking as a member of the Supreme Court's Advisory Committee and as the representative of the Committee itself is not controverted by the expression of any Court and we submit that it is entirely sound.

But notwithstanding the clear and unmistakable language of Rule 41 and the well settled doctrine of the decisions of this Court and of the various Circuit Courts of Appeal that the decision of the trial Court on a motion for leave to discontinue will not be reviewed in the absence of an obvious abuse of the Court's discretion, the Circuit Court of Appeals for the Eighth Circuit arbitrarily and without any foundation in the Record and without any attempt to impeach the discretion of the trial Court set aside its order which granted plaintiff leave to dismiss without prejudice. By so doing the Court of Appeals nullified the provision in Rule 41b which makes it discretionary with the trial Court whether the plaintiff shall be allowed to dismiss without prejudice and it disregarded and denied legal effect to the unambiguous language of that rule. Its decision conflicts in principle with controlling decisions of this Court and it is in conflict with decisions of other Circuit Courts of Appeal and with its own decisions.

Furthermore, it is not only impossible to reconcile the decisions of the Circuit Court of Appeals for the Eighth Circuit with the plain language of Rule 41 and with the decisions of this Court establishing the principles by which Rule 41 must be interpreted but it is impossible

to reconcile the various decisions of the Circuit Court of Appeals for the Eighth Circuit itself as witness its decisions in the Boaz case (Boaz v. Mutual Life Ins. Co., 146 Fed. [2d] 321); in the Federal Savings Loan case (Federal Savings & Loan Ins. Co. v. Reeves, 148 Fed. [2d] 731); in Home Owners Loan Corporation v. Huffman, 134 Fed. (2d) 314; in United Motors Service v. Tropic-Aire, 57 Fed. (2d) 479; in American Grain Separator Co. v. Twin City Separator Co., 202 Fed. 202; and in Hartford-Empire Co. v. Obear-Nester Glass Co., 95 Fed. (2d) 414.

This is a matter of great public importance. There should be an interpretation of Rule 41 by this Court. Unless and until such a ruling is announced, the confusion that is now so evident in the Eighth Circuit will continue. Just as this Court in the Barrett case (Barrett v. Virginian Ry. Co., 250 U. S. 478) resolved the confusion that resulted from the decisions of the Circuit Court of Appeals for the Fourth Circuit in the Barrett case itself, 244 Fed. 397, and in Hunt v. McNamee, 141 Fed. 293, and in Pannill v. Roanoke Times Co., 252 Fed. 910, and in Parks v. Southern Railway, 143 Fed. 276, so the Supreme Court should now resolve the confusion that has found its way into the decisions interpreting Rule 41, particularly the decision of the Circuit Court of Appeals in this case which nullifies and sets at naught the rule that the decision on a motion for leave to dismiss without prejudice rests in the discretion of the trial Court.

CONCLUSION.

Whether the ends of justice would be best served by the granting of a nonsuit was for the Court to decide. That was a matter that rested in his sound discretion. He sat at the very seat of justice. He saw the witnesses on the stand. He observed the conduct of the parties and their counsel. To him the lawsuit was not just a sporting proposition but an effort to get at justice. He ruled on the admissibility of evidence, on the burden of proof, on the propriety of questions and the nature of answers.

The effect of granting a voluntary nonsuit was to give the plaintiff an opportunity for a new trial.

In Kuenzel v. Stevens, 155 Mo. 280, 285, the Supreme Court of Missouri said:

> "The case is here on appeal and the usual and immemorial appellate practice must obtain. It is here for review on matters of law, not on the weight of the evidence, **nor for the court to substitute its discretion for the discretion of the trial court.**"

And continuing on page 285 the Court said:

> "There is no more important power for the promotion of justice than that intrusted to the trial court in the matter of granting a new trial. It is a power to be exercised with great care, and no one is so well informed as to how the discretion should be used as the trial judge. It is only when it very clearly appears that a wise discretion has not guided his action that an appellate court should interfere."
>
> **"Whatever difference of opinion there may be as to the side to which this evidence gravitates, there can be no doubt but that the evidence in support of the plaintiff's theory was of character sufficient to be denominated substantial, and therefore applying the**

principles above stated the appellate court should not disturb the order of the trial judge made in the exercise of a discretion which is within his province alone."

In his discretion he thought that the plaintiff should have another opportunity to present the case. There was no basis whatever for that decision being set aside.

We submit that in the interest of justice and in the interest of uniformity of decision, this Court should review the decision of the Circuit Court of Appeals in this case and that the writ of certiorari prayed for herein should be granted.

Respectfully submitted,

LUKE E. HART,
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Of Counsel.

St. Louis, Missouri
July 10, 1946.

The emphasis used herein is ours.